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Issue date: 11Oct2001

CASE NO.: 2000-LHC-2713

OWCP NO.: 4-034945

IN THE MATTER OF:

MANUEL O. CARRANZA
Claimant

v.

PATAPSCO RECYCLING, LLC[1]
Employer

APPEARANCES:

Myles R. Eisenstein, Esq.
For the Claimant

Steven B. Preller, Esq.
For the Employer

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 30, 2001 in Baltimore, Maryland, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

[1]As of the date of the alleged injury on March 8, 2000, the Employer's maritime insurance policy had lapsed and there was no coverage under the Longshore Act as of that date.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on March 8, 2000 in the course and scope of his employment.

4. Claimant gave the Employer notice of the alleged injury on March 8, 2000.

5. Claimant filed a claim for compensation on or about April 12, 2000.

6. The parties attended an informal conference on June 21, 2000.

7. The applicable average weekly wage is $400.00.

8. The Employer voluntarily and without an award has paid temporary total compensation from March 8, 2000 through March 25, 2000, for a total of $1,282.84. The Employer has paid Claimant's medical bills at Concentra Medical Centers.

The unresolved issues in this proceeding are:

1. The fact of injury.

2. Whether or not Claimant sustained an injury in the course of his maritime employment on March 8, 2000.

3. If so, the nature and extent of his disability.

4. Entitlement to an award of medical benefits, as well as additional compensation pursuant to Section 14(e).

5. Interest on any unpaid compensation benefits.

6. Entitlement to an attorney's fee and reimbursement of litigation expenses.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**

EX 5 04/19/01	Attorney Preller's letter filing	
EX 6 04/19/01	Claimant's "employment records produced by Cecilia Dabon of Associated Building Maritime Co., Inc. at the March 30, 2001 hearing."	
CX 7 06/06/01	Attorney Eisenstein's April 9, 2001 letter relating to certain court records of the Claimant	
CX 8 06/06/01	Attorney Eisenstein's status report	
EX 7 06/08/01	Attorney Preller's status report	
CX 9 06/11/01	Attorney Eisenstein's status report	
CX 10 06/11/01	Attorney Eisenstein's letter confirming the briefing schedule	
EX 8 07/16/01	Employer's brief	
CX 11	Claimant's brief	07/19/01

The record was closed on July 19, 2001 as no further documents were filed.

Summary of the Evidence

Manuel O. Carranza ("Claimant" herein), who has a third grade elementary school education and who can read and write only in the Spanish language and who has no facility in the English language, has been in the United States of America for about five (5) years and worked for Patapsco Recycling, LLC ("Employer") for three years and two months at the Port of Baltimore. The Employer is in the business of recycling scrap metal and several years ago the Employer was given a contract from the U.S. Government to dismantle the **U.S.S. Coral Sea**, a decommissioned naval vessel, and Claimant worked on that project during the entire time he was employed by the Employer. According to Claimant, his job involved working on the vessel

and carrying scrap metal from the ship to the dock. He was able to do his physically-demanding work and interact with his co-workers through two workers who were bilingual. (TR 47-49)

On March 8, 2000 Claimant was working on a lower compartment of the ship removing pieces of bronze metal from the ship and while picking up and putting on his right shoulder a piece of bronze weighing approximately 150 pounds, he slipped on some oil on the compartment floor and he went backwards against the wall and then forward. He experienced the immediate onset of low back pain at about 10 a.m. but he continued to work with smaller pieces of scrap metal until his lunch break. The back pain worsened as his "warm body ... cooled off" but he tried to resume work at 1:00 p.m. but could not do so because of the pain. He reported the incident to Pedro, one of the bilingual workers, and Pedro reported it to the foreman and Claimant was told to rest. He then laid down on a board until about 3:00 p.m., at which time he was told to go to work in the forklift moving the pieces around the dock; but the "bouncing" of the forklift aggravated his back pain and he stopped working around 4:00 p.m. (TR 49-54)

At 9:00 a.m. on March 9, 2000, Claimant returned to work at the Employer's facility but he was unable to work because of the back pain and his boss was told to take Claimant to Concentra Medical Centers located near the BWI Airport. (TR 54-56)

According to the Centers' report, Claimant was at that facility from 1:02 p.m. to 4:40 p.m. and Norman M. Balog, D.O., was the treating physician. X-rays were taken, three types of medication were prescribed, as well as physical therapy and riding on a stationary bicycle. The following notations were made on that March 9, 2000 report (CX 1 at 3):

Diagnosis: 847.2 Lumbar Strain

<u>Patient Status:</u>

Modified Activity - Returning for follow-up visit
Restricted Activity (In effect until next physician visit):

Return to work on 03/09/2000 with the following restrictions

Off work rest of shift with limited activity as follows:

No repetitive lifting over 10 lbs.

No bending greater than 4 times per hour

No pushing and/or pulling over 15 lbs. of force

No squatting and/or kneeling

Remarks:

Anticipated Date of MMI: 03/23/2000

Next Visit(s):

Visit Date: Friday March 10, 2000 11:30 am
Provider/Facility: Sam Runfola, PT

Visit Date: Monday March 13, 2000 9:30 am
Provider/Facility: Norman M. Balog, DO

Claimant had physical therapy at that facility on March 10, 2000 (CX 1 at 4) and on March 13, 2000, at which time Jesse L. McFarland, PA-C, reported as follows (CX 1 at 5):

Patient Status:

Modified Activity - Returning for follow-up visit

Restricted Activity (In effect until next physician visit):

Return to work on 03/13/2000 with the following restrictions

No repetitive lifting over 15 lbs.

No bending greater than 6 times per hour

No pushing and/or pulling over 20 lbs. of force

No squatting and/or kneeling

Remarks:

Anticipated Date of MMI: 03/23/2000

Claimant also had physical therapy on March 15, 2000 (CX 1 at 6) and on March 17, 2000, at which time Candace S. Treadway, PA-C, reported as follows (CX 1 at 8):

Patient Status:

Modified Activity - Returning for follow-up visit

Restricted Activity (In effect until next physician visit):

Return to work on 03/17/2000 with the following restrictions

No repetitive lifting over 25 lbs.

No pushing and/or pulling

Remarks:

Anticipated Date of MMI: 03/23/2000

Claimant also had physical therapy in a one hour session on March 20, 2000 (CX 1 at 9) and again a 39 minute session on March 22, 2000, at which time Ms. Treadway reported as follows (CX 1 at 10):

Patient Status:

Modified Activity - Returning for follow-up visit
Restricted Activity (In effect until next physician visit):

Return to work on 03/22/2000 with the following restrictions

No repetitive lifting over 50 lbs.

No pushing and/or pulling over 60 lbs. of force

No squatting and/or kneeling

Remarks:

Anticipated Date of MMI: 03/23/2000

The next physical therapy session was scheduled for 10:00 am on Monday, March 27, 2000.

The next medical report offered by the Claimant is the April 14, 2000 report of Dr. Stephen D. Rosenbaum, an orthopedic surgeon, and the doctor reports as follows in his report (CX 2):

“The patient states that he was lifting a heavy object and fell 3-8-00 while working sustaining an injury to his lumbar spine. The patient presently has complaints in the lumbar spine. He was seen by the company clinic (Concentra Medical) where he was x-rayed, given pain medication and physical therapy treatments. He was followed by Concentra.

“Past History: Non-contributory.

"Family History: Non-contributory.

"The patient is accompanied by an interpreter. The patient states through the interpreter that his back did not directly strike the ground. He states that the pain medication given to him by the company clinic was not effective. Unfortunately, the patient does not know the name of the medication. The patient through the interpreter denies previous problems with his back...

"X-rays taken of the lumbar spine, 5 views, reveals a partial defect seen at L54-S1 (sic) posteriorly. No forward slip is noted. There is some loss of lordosis as well as sacralization. No fractures are identified.

"Diagnosis: Strain/sprain lumbar spine.

"Additional diagnosis: Spondylolysis.

"Comment and Opinion: The patient was seen in orthopaedic consultation this date. The findings are as above.

"The patient was given a prescription for Flexeril, but was advised this medication can sedate and dry the mouth. Also, the patient was given a prescription for Motrin 800 mgs. Through the interpreter the patient was advised of the precautions of these medications. Physical therapy treatments will be instituted.

"At the patient's request, he was given a prescription for a cane. He was advised to discontinue its use in two weeks.

"The patient will be re-examined in four weeks."

Dr. Rosenbaum next saw Claimant on April 11, 2000, at which time the doctor reported (CX 2):

"The patient returns to see me this date. Again, he is accompanied by an interpreter who states the patient is still using the cane because he is "losing control of his right leg." The patient's interpreter is his girlfriend who states she was not with him when he was seen at Concentra and was not advised of the x-ray findings.

"The patient relates through the interpreter that he has a problem with his right leg and back. The patient points to the anterior aspect of the right leg, not sciatic distribution as the area of symptomatology. The patient is able to heel and toe ambulate, but complains of pain when he heel ambulates. Forward flexion of the lumbar spine lacks the terminal 20 degrees. Extension is limited to 25 degrees to the left. When the

patient was asked to point to the area pain on range of motion, he points to the mid lumbar region and dorsal spinous process. Reflexes are symmetrical and non-pathologic. Straight leg raising test on the right causes lower lumbar pain and pain in the anterior femur. Through the interpreter the patient states he has no sensory loss.

"The interpreter was advised that in view of the patient's subjective complaints, a nerve conduction study will be ordered to rule out sciatic vs. peripheral nerve entrapment. Physical therapy with the additional of traction will be continued. The patient states he is out of medication. He was given a prescription for Motrin 800 mgs. The patient through the interpreter requested a lumbar support, but this was denied.

"I will see the patient back in two weeks."

Dr. Rosenbaum next saw Claimant on May 25, 2000, at which time the doctor reported (CX 2):

"The patient returns to see me this date. He is again accompanied by an interpreter who states that the patient is still having problems with his leg. When the patient was asked to point to the area of symptomatology, he points to the anterior aspect of the leg, not the sciatic region. The patient states that his leg falls asleep. Results of the nerve conduction study are interesting in that chronic L4 (rule out L5) radiculopthy is noted, but this is bilateral. No active denervation was noted.

"Examination of the lumbar spine reveals forward flexion lacks the terminal 15 degrees. Extension measures 20 degrees. Lateral tilt measures 25 degrees to the right, and 25 degrees to the left. When asked where the patient's symptomatology is, he points to the mid lumbar region and dorsal spinous process. When asked to walk in his toes, the patient responds in Spanish "it hurts too much." Heel ambulation is performed well. There are no long tract signs.

"Physical therapy treatments will be discontinued. The patient states that the Motrin is effective. I have given the patient a set of exercises for his lumbar spine to be performed at home.

"The patient will be re-examined in four weeks time."

Claimant was referred by Dr. Rosenbaum for nerve conduction studies/electromyography and Dr. Michael S. Sellman, a specialist in neurology and electromyography, concludes as follows in his May 17, 2000 report (CX 3):

"<u>CLINICAL HISTORY:</u>

This 48-year-old man sustained injuries to his low back while on the job on February 8, 2000 (sic). Ever since that time, he has been troubled by bilateral low back pain which radiates down each leg. Testing is requested to evaluate for focal nerve damage as a result of his injury...

INTERPRETATION:

This is an abnormal study. There is evidence of a chronic bilateral L4 or possibly L5 radiculopathy. At present, there is no evidence of active axonal denervation. These abnormal findings would help to explain the persistent symptoms that Mr. Caranza (sic) reports since his injury.

Thank you for referring Mr. Caranza (sic) for testing.

Claimant was examined on June 14, 2000 by Dr. D. Graham Slaughter, a specialist in spinal and neurological surgery, and the doctor reports as follows in his CLINICAL NOTE (CX 4):

"Mr. Carranza is seen in consultation for evaluation of injuries sustained on 3/8/2000 while he was working on his job as a welder. He lost control while scrapping a piece of metal and fell. Since that time he has had persistent pain involving his lumbar spine limiting his mechanical ability. Since the accident of 3/8 he has not been able to work because this loading of his lumbar spine increases his midlumbar discomfort. He also described intermittent cramps in his legs. There is no radicular component from his back into his legs, he has just spontaneous leg cramps. No significant subjective numbness or weakness. He has been treated with physical therapy and medication without significant improvement.

"PAST HISTORY

No significant operations, medical history is noncontributory.

"NEUROLOGIC EXAMINATION

Mechanical exam of the lumbar spine reveals forward bending to approximately midcalf level when he gets bilumbar discomfort. Hyperextension is performed to only twenty degrees and further extension produces increasing midlumbar spine pain. Straight leg raising is negative. Motor examination is intact, deep tendon reflexes are one to two plus and equal, no pathologic reflexes present. Electromyography by Dr. Sellman revealed chronic bilateral L4 and possibly L5 radiculopathy.

"CLINICAL IMPRESSION

Persistent lumbosacral discomfort limiting mechanical activity

without neurologic deficit.

“DISPOSITION

I would strongly recommend having an MRI scan to define whether he has had a disc injury. He has not responded to conservative management and hence a structural abnormality has a high probability,” according to the doctor.

The MRI was performed on June 14, 2000 (CX 5) and Dr. Slaughter discussed the test results with the Claimant on June 26, 2000 (CX 4):

“Manuel is seen following the MRI scan which shows that he has an L2-3 degenerative disc but there is no evidence throughout his lumbar spine of definitive disc herniation, canal or foraminal stenosis. He continues with his limiting back discomfort and is trying to increase his activity but this accelerates his underlying discomfort. I feel that he needs more conservative management and have placed him on a Medrol dosepak as well as indomethacin. I will see him again in three weeks.

“DIAGNOSIS:

Traumatic myoligamentous injury to the lower lumbar spine with underlying degenerative disc disease.”

Dr. Slaughter next saw Claimant on July 17, 2000, at which time the doctor reported (CX 4):

“Manuel is doing better. He is taking the indomethacin and it is doing a lot for him. He is increasing his physical activity and I anticipate that he will be able to return back to work in approximately four more weeks,” according to the doctor.

Claimant testified that he stopped going to Concentra Medical Centers because no one there spoke Spanish and he had difficulty talking to the doctors and the therapists. He asked Pedro to talk to the boss so that he (Claimant) could have medical treatment at a clinic where someone spoke Spanish so that he could communicate his problems to the medical providers. Claimant also testified that he was out of work for one week and returned to light duty work but he had to stop after two days because he could not do the heavy lifting and because the Employer had no light duty work for him. There is a dispute among the parties as to whether or not Claimant worked between March 8, 2000 and March 25, 2000, at which time Claimant and eight (8) other workers were laid-off because the Employer lost the contract on the **USS Coral Seas**, and whether or not he received wages for those weeks as reflected on those wage

records and checks admitted into evidence as EX 1 and EX 2, and this issue will be further discussed below. Claimant is pleased with the treatment he received from Dr. Rosenbaum and he considers the doctor his treating physician. (TR 56-65)

About one year prior to his injury on March 8, 2000, Claimant began part-time work as a janitor for Associated Building Maintenance (ABM), Claimant describing that work as light duty and involving, **inter alia**, picking up and emptying trash, wiping off the furniture and vacuuming the floors (however, he was unable to do vacuuming after March 8, 2000 because of his back pain). He worked anywhere from 2-3 hours each night, five nights per week, usually stopping when the floors of the office building to which he was assigned were completed. He was able to do that light work while he was going to CMC for therapy and seeking medical treatment because his girl friend would perform the heavier parts of the job, such as the vacuuming. He was paid $5.50 per hour and worked an average of 20 hours per week. He quit that job in December of 2000 and he now works for another recycling company, Terrapin Recycling, LLC. He was hired after he told them about his back problems and after he was told that he would be given much easier work simply separating pieces of metal. (TR 66-70)

Claimant's low back condition has improved because he no longer has to do that physically-demanding work that he used to do for the Employer. However, he still cannot bend over or stretch or sleep on his back. He has to work, although he still has low back pain, because he has six children to support. He has been unable to obtain medical treatment since July of 2000 because of a lack of funds and he finally had to seek assistance from an attorney because his medication supply had been exhausted and because the medication relieved some of the symptoms. Claimant had no back problems prior to March 8, 2000 and he has not reinjured his back in any way since that time. (TR 70-73)

In response to cross-examination, Claimant admitted that he may have made several mistakes on his claim for benefits (EX 4) because he did not understand the questions and because the form was completed by someone in his attorney's office. He admitted that he "worked" the evening of March 8, 2001 at ABM, that his girlfriend drove him there but that she did the work because he was unable to do the heavier aspects of the job, although he may have wiped off some furniture. He missed no work at ABM because his girlfriend helped him and he was able to carry from the building a garbage bag because it was not heavy and contained only trash. He told the owner of ABM of his back injury and he asked her if his girl friend could accompany him to the office building, and Claimant was given approval therefor. He tried to do some construction work for one day but was unable to perform

that job. He was paid $50.00 in cash for 5 ½ hours of work. In October of 2000 he started to work at FILA with duties of attaching stickers to the shoes, clothes, etc., made by that company. He was paid $8.50 per hour for that temporary job that lasted about three months. As he needed that job, he did not tell them about his back problems. He applied for unemployment benefits but he was denied because he had a part-time job at ABM and because he had filed a workers' compensation claim on April 12, 2000. (EX 4, TR 75-144)

Ventura Aguilar, testifying for the Employer, testified that he was working with the Claimant on March 8, 2000, both for the Employer and for ABM, that he did not see the injury take place, that he did work with the Claimant in the afternoon and observed him "picking up heavy things," the witness remarking, "He was strong. He used to lift heavy things more than anybody else," that two hours later (Mr. Aguilar) asked him if he was feeling all right and he told (Mr. Aguilar) that he was feeling all right" but that "(a)after a little while, he told me he wasn't feeling well" and "so he stopped working and he went to lay down." Mr. Aguilar also corroborated Claimant's testimony as to the fairly light janitorial work both perform at ABM and that Claimant's girl friend helped him with his tasks when she was there. Mr. Aguilar still works for ABM. Claimant was given by the Employer easier work on the bobcat because "he had been hurt" and "so he wouldn't have to lift up heavy things." (TR 144-153, 160-161)

In response to intense cross-examination, Mr. Aguilar admitted that he could not have seen the accident because Claimant was working down below in the hold or tank of the vessel and he was upstairs "on the top of the tank." (TR 158) He also admitted that Claimant could not be working for the Employer during those hours he was at CMC for medical treatment and physical therapy. (TR 161-164)

The Employer also called Hilario Sanchez as a witness and Mr. Sanchez, who described himself as a friend of the Claimant, testified that they worked together for the Employer at the International Towers, one of the office buildings cleaned by ABM, that he also did not see Claimant's accident and "found out that he was hurt... two or three days later," that he was also laid off by the Employer toward the end of March of 2000, that he observed Claimant after March 8, 2000 working for the Employer and "cleaning metal," that the Employer was "giving him light work after the accident," and that "(t)hey were being considerate to him because of his injury," Mr. Sanchez remarking, "I believe maybe it was doctor's order." While he and Claimant worked for ABM at the same building, they were on different floors and he "really did not have direct contact with Mr. Carranza." He did notice Claimant's girl friend helping him

with his tasks and that he (Claimant) "was not picking them up (**i.e.**, boxes of supplies) as he was picking them up as usual before, before the accident." He also admitted that the filled garbage bags are "very light because we only have paper trash." (Tr 177-176)

Maria Cecilia Dubon, who has worked for ABM for fourteen (14) years and who currently serves as the operations manager, testified that she supervises the overall cleaning of about forty (40) buildings, that her duties require her to make sure the employees are on time, that the necessary supplies are at the site, etc., that ABM provides cleaning and janitorial services to commercial buildings and other projects, that Claimant began to work for ABM in 1997 and that he stopped working for ABM on October 31, 2000 and that she brought to the courtroom Claimant's personnel and wage records. Those records, admitted as EX 6, reflect that Claimant worked four (4) hours on March 8, 2000 from 6 to 10 p.m., four (4) hours on March 9, 2000, as well as four (4) hours each night during the following week beginning on Monday, March 13, 2000. He also worked four (4) hours each night the following week beginning on March 20th; he also worked on March 28th, 29th, the 30th and the 31st. Ms. Dubon makes it a point to visit each of her buildings at least once a week and she testified that Claimant had told her that he had hurt his back on his other job, that he did ask her if his girl friend could assist him with his work, that she gave his girl friend, Elvira, permission for such assistance and that Elvira helped Claimant for several months. Claimant was paid every two (2) weeks by ABM and he was paid $242 for the time period ending March 15th and $264 for the time period ending March 31st. (TR 176-188)

Sandra Lee Ellis, the Employer's Administrative Assistant, is the mother of Kerry Ellis, the Employer's manager, and she testified that she learned of Claimant's March 8, 2000 injury the following day, that the Employer learned thereafter that Claimant was working for a cleaning company, that Kerry began taking surveillance videotapes of Claimant on March 12, 2000 (EX 3), that the tape shows Claimant, other ABM employees and Elvira, on certain evenings, entering and/or leaving the office building in question and that the video is accurate. Ms. Ellis also testified that EX 1 shows payments to the Employer's employees, that sometimes they are paid by check and other times by cash, depending upon the availability of cash on-hand. Kerry Ellis takes care of hiring, firing and paying the employees. There is a one week hold on wages and the receipt of a check or cash represents work done the week before, and the work week, for payroll purposes, begins on a Sunday. Claimant's time cards for his work on March 6, 2000 and thereafter are in evidence as EX 2. Ms. Ellis further testified that Claimant was paid his regular wages when he went to CMC for medical treatment. (TR

188-197)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet

Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the

First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that an employee's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for

Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out

of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his lumbar disc syndrome resulted from working conditions and/or his March 8, 2000 accident at the Employer's maritime facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established

a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his back in the course of his maritime employment on March 8, 2000. While the Employer disputes the occurrence of the injury as alleged by Claimant and has offered the testimony of two co-workers in an attempt to

defeat this claim, I credit the credible testimony of the Claimant that he injured his back while lifting a piece of bronze metal weighing over one hundred pounds, especially as the co-workers (1) were not in a position to see the accident as it occurred, (2) did observe Claimant's lumbar problems later that day and (3) did observe Claimant lying down in an attempt to relieve the pain. Moreover, Claimant went for medical treatment the following day and the doctor diagnosed the back problems as due to a lumbar strain. Claimant does not, in my judgment, require an eye-witness to corroborate his testimony as to how he was injured as I find him to be a most credible Claimant. While Employer points to certain erroneous and/or misleading entries on his compensation claim (EX 4), that form was filled out by someone in the attorney's office and any inconsistencies resulted from Claimant's third grade education, his lack of knowledge of English, his misinterpretations of certain key questions and his reliance of others for assistance in his social interaction with his co-workers and bosses.

The Employer's evidence will be further discussed below in the section dealing with disability.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-**

Hamilton Stevedore Company, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Although the Employer did not receive written notice of the Claimant's injury as required by Sections 12(a) and (b), **i.e.**, by the filing of the Form LS-201, the claim is not barred because the Employer had actual knowledge of Claimant's back injury on March 8, 2000 or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General**

Dynamics Corp., 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As Claimant's injury occurred on March 8, 2000 and as his claim for compensation benefits, **i.e.**, Form LS-203, is dated April 12, 2000 (EX 4), Claimant has satisfied the requirements of Section 13(a) of the Act, and I so find and conclude.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his

willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a scrap iron worker. That The Employer may have lost its dismantling contract with the U.S. Government is no defense herein. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find and conclude Claimant has a total disability, except during those time periods he was able to work elsewhere. Claimant was released to return to work on March 22, 2000 with restrictions against lifting over 50 pounds or pushing and/or pulling over 60 pounds. However, the Employer was unable to provide such adjusted work and he and others were laid-off on March 25, 2000. Claimant was still experiencing back pain and he went to see Dr. Rosenbaum as his free choice of physician as the Employer selected and paid for the treatment at the CMC. Dr. Rosenbaum examined Claimant on April 14, 2000, May 12, 2000 and May 30, 2000 and he cleared Claimant to return to work on light duty on May 9, 2000. (CX 2) Claimant then was examined by Dr. Slaughter on June 14, 2000 (CX 4) and after Claimant’s June 14, 2000 MRI of the lumbosacral spine was read by Dr. Carlton C. Sexton as showing L2-3 degenerative disc disease without disc herniation, as well as possible L5 spondylolysis without spondylolesthesis (CX 5), Dr. Slaughter, as of July 17, 2000, opined that Claimant “will be able to return back to work in approximately four more weeks.” (CX 4)

In this proceeding Claimant seeks benefits for temporary total or partial disability benefits from March 9, 2000 through August 18, 2000, subject to a credit for days worked and wages paid during that closed period of time. (TR 35-39)

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d

208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the

burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem.**, 617 F.2d 292 (5th Cir. 1982).

Moreover, in this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from March 9, 2000 through August 18, 2000. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 1) In this regard, **see Seals v. Ingalls Shipbuilding, Divisions of Litton Systems, Inc.**, 8 BRBS 182 (1978).

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for temporary partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS 327, 330 (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity),

it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back condition and that his current employer has allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the

parties are in disagreement as to Claimant's post-injury wage-earning capacity.

As noted above, Claimant seeks benefits for certain periods of time and the principal issue remaining is the nature and extent of his disability and for which periods of time. This Administrative Law Judge, in resolving this issue, notes that the Employer has offered a videotape in an attempt to defeat this claim. Claimant objected to the admission of the videotape (TR 33) until such time as he had the opportunity to cross-examine the videographer Kerry Ellis, the Employer's president. As that deposition has not taken place, as Claimant has been denied his due process rights to confront Mr. Ellis and as the videotape has been "selectively edited," I find and conclude that there are problems with the videotape and as that videotape has not been authenticated and as I saw that videotape as part of the hearing, such videotape, in my judgment, shall not be admitted into evidence as I have serious concerns about its etiology, its custody and control and the obvious "selective editing."

Claimant's issues, filed previous to the hearing were "temporary total disability from March 9th, 2000 through August 18th, 2000, subject to a credit for days worked and wages earned." Employer claims that Claimant submitted a false claim for benefits under the Longshore Act. The plain answer to this allegation is that Employer has not submitted a scintilla of evidence in support of its allegations of a false claim.

The claim form was filed by a Claimant who speaks no English, based upon information given to an attorney who speaks no Spanish.

While no mention was made by the Claimant of the fact he continued in his 2 hour per day, part-time job, the fact remains that Claimant understood that question as referring solely to his work for the Employer.

The testimony of the Claimant is clear, he was only able to continue working in the 2 hour per day, part-time job because his girl friend was doing the harder work, such as vacuum cleaning. (TR 67)

This fact is totally verified by Maria Cecilia Dubon, a witness called to testify by the Employer. (TR 184)

> "Q: All right. Did he ask you whether or not his girlfriend could help him perform duties for Associated Building Maintenance?
>
> A: Yes he did."

The part-time job consisting of 2 to 2 ½ hours per evening, should not prevent this Claimant from receiving temporary total benefits, due to an inability to perform his heavy duty full time job, according to Claimant.

Claimant requests an award of temporary total compensation benefits from March 9, 2000 through August 18, 2000 (**see** CX 4, Dr. Slaughter's September 17, 2000 report) or at the very least, until My 9, 2000 (CX 2, the date Dr. Rosenbaum authorized Claimant to return to "light duty" work).

On the other hand, the Employer submits that the claim should be dismissed (1) because he is not a credible Claimant, (2) because he filed a false claim for benefits and (3) because he has not established a loss of wage-earning capacity.

According to the Employer (EX 8 at 2-3):

"Based upon the evidence submitted at the hearing, it is clear that the Claimant submitted a false claim for benefits under the Act. Contrary to the statements made by the Claimant under criminal penalty in the Claim Form on April 12, 2000, the Claimant worked since the alleged accident, and earned wages since the accident. The numerous statements in the Claim Form to the contrary are false. In fact, the Claimant never missed a single day of work from his employment with Associated Building Maintenance Co., Inc. ("ABM") since the alleged injury. Incredibly, he worked the evening of March 8, 2000 immediately after suffering his alleged injury! Moreover, he worked five days a week since the accident without absence at ABM. Each evening he worked for four hours as a janitor at a commercial building. Each week the Claimant worked twenty hours at the rate of $5.50 per hour. He admitted that during the course of this employer he (i) carries a vacuum cleaner on his back, (ii) vacuums and cleans one level of the building, and (iii) carries out trash and lifts boxes. He also admitted to being able to run. This testimony by the Claimant makes clear that he submitted a false claim for total disability and is not injured as alleged. The Claimant should not be rewarded in these proceedings for his deceptive and illegal conduct.

"In addition, the Claimant worked for Employer subsequent to the alleged injury. According to his timecard, he worked on March 9, 2000 from 7:06 a.m. until 5:18 p.m. and also worked on March 20, March 21, March 23 and March 24, 2000. On March 25, 2000, Claimant was laid-off with eight other workers because the Employer's contractual right to finish scrapping the **U.S.S. Coral Sea** was terminated. Pursuant to the request of the Judge at the hearing, attached hereto are documents pertaining to the loss of the Employer of the right to scrap the **U.S.S. Coral Sea**. According to the Employer's records, Claimant received gross

wages in the amount of $480.00 on March 10, 2000, net pay of $358.83 on March 17, 2000, net pay of $241.24 on March 24, 2000 and gross wages in the amount of $252.77 on March 31, 2000.

"According to the medical records of Concentra Medical Centers, the Claimant was diagnosed based upon his subjective complaints as having suffered a lumbar strain and was immediately cleared to return to manual labor with some restrictions. Moreover, the MRI report reveals that the Claimant has degenerative disc disease which is, of course, unrelated to the alleged work related injury. At most, the Claimant suffered a simple back sprain - nothing more.

"Claimant is not entitled to the relief sought, **i.e.**, temporary total disability from March 9, 2000 through August 18, 2000, subject to a credit for days worked and wages earned. While the Employer agrees that it is entitled to a credit for 'days worked and wages earned,' it does not agree that Claimant suffered any total disability, or any partial disability for the period alleged. The Claimant has worked at ABM every day since the alleged injury and, consequently, has not suffered any total disability. In addition, Claimant was back to work full-time with the Employer as of March 20, 2000 with the following restrictions: (i) no repetitive lifting over 50 lbs, and (ii) no pushing and/or pulling over 60 lbs of force. It is clear that as of March 20, 2000, the Claimant was not incapacitated because of injury to earn the wages which the employee was receiving at the time of the injury and, consequently, was not suffering from a "disability" as defined at 33 U.S.C. §902(10). It is only after the Employer had to reduce its workforce on March 25, 2000 that Claimant alleged total disability (while working at ABM). Pursuant to 33 U.S.C. §906, no compensation shall be allowed for the first three days of the disability, unless the injury results in disability of more than fourteen days. At best, Claimant suffered temporary partial disability from March 11, 2000 until March 20, 2000 when he returned to work full-time with the Employer. The Claimant does not have a worker's compensation claim for the period after he returned to work full-time. What Claimant is attempting to do is to convert an unemployment claim as a result of being laid-off into a disability claim. Quite simply, his earnings decreased on March 25, 2000 as a result of being laid-off, not as a result of any disability.

"Further, the Claimant is not entitled to recover any medical expenses. The Employer furnished medical care at its expense to Claimant at Concentra Medical Centers. After the Claim Form was filed, the Claimant changed physicians without the prior consent of the employer, carrier, or deputy commissioner as required by 33 U.S.C. §907. Further, pursuant to 33 U.S.C. §907, an employee shall not be entitled to recover

any amount expended by him for medical treatment unless the employer refused or neglected a request to furnish such services or the nature of the injury required such treatment and the employer having knowledge of such injury shall have neglected to authorize the same."

Initially, I note that I make no findings as to whether or not Claimant intentionally and/or knowingly filed a false claim for benefits. Claimant has no ability to speak or read English and he has to rely upon others for assistance in his societal relationships and it could very well be that there was an unintentional miscommunication between Claimant and his attorney when the Form LS-203 was completed. In that regard, I give Claimant the benefit of the doubt, because of the serious legal ramifications as a result of the 1984 Amendments to the Act with reference to the filing of false claims.

I find and conclude that Claimant sustained a relatively minor injury on March 8, 2000, received proper conservative treatment at Concentra Medical Centers, was able to work at his part-time job that evening, and for the subsequent evenings that he was scheduled to work, that such part-time job clearly establishes that he is not totally disabled, that the Employer provided light duty work for the Claimant upon his return to work on March 20, 2000, gave him time off work for his medical appointments at Concentra and, most important, paid him his full regular wages until March 25, 2000, at which time he and eight other workers were laid-off "because the Employer's contractual right to finish scrapping the **U.S.S. Coral Sea** was terminated."

Thus, as Claimant was properly laid-off and as he received his regular wages until that **bona fide** layoff, Claimant has not established either the total or partial disability that he alleged, and, in my judgment, is not entitled to the compensation benefits for the time period he seeks, and I so find and conclude.

Claimant's treatment at Concentra was reasonable and necessary and he was released to return to work with restrictions that permitted him to perform the easier work provided by the Employer.

However, the Employer does concede that Claimant is entitled to an award of "temporary partial disability from March 11, 2000 until March 20, 2000 when he returned to full-time work with the Employer."

Accordingly, I find and conclude that Claimant is entitled to an award of benefits for his total disability from March 9, 2000 through March 20, 2000, based upon the stipulated average weekly wage of $400.00. I note that the parties made that

stipulation based upon his wages with the Employer and that the parties did not include his wages with ABM. Thus, as the parties did not include those wages, I will not consider them with reference to the benefits awarded Claimant. If they were included in the average weekly wage, the Employer would be entitled to a credit therefor. Thus, those wages are "a wash" herein at this time and on this issue.[2]

The Employer points out that "Claimant received gross wages in the amount of $480.00 on March 10, 2000, net pay of $358.83 on March 17, 2000, net pay of $241.24 on March 24, 2000 and gross wages in the amount of $252.77 on March 31, 2000.

The record is unclear as to what wages Claimant received for the exact time period of March 11, 2000 through March 20, 2000, as those gross wages have not been further particularized by the parties. In any event, it is well-settled that wages paid as part of an employer's wage-continuation policy, during a period of disability, are not entitled to a credit for Section 3(e) purposes unless the employer intends those payments as advance payments of compensation. In the case at bar, the Employer's Longshore Act coverage had lapsed as of March 8, 2000 and those payments cannot be considered advance payments of compensation.

However, I also note that the parties have stipulated that the "Employer voluntarily and without an award has paid temporary total compensation from March 8, 2000 through March 25, 2000, for a total of $1,282.84." Thus, pursuant to Section 3(e), the Employer is entitled to a credit for the compensation benefits already paid Claimant from March 9, 2000 through March 20, 2000 if, in fact, those payments were intended to be advance payments of compensation.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979);

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[2]I make this award even though Claimant was working part-time for the twenty (20) hours each week based upon the parties' stipulation as to Claimant's average weekly wage.

Santos v. General Dynamics Corp., 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 222 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the

requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS 185, 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on March 9, 2000 and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care, the Employer has not paid for the medical bills relating to the treatment by Dr. Rosenbaum, Claimant’s treating physician and his initial free choice of physician, and the necessary consultation with Dr. Slaughter. Thus, any failure by Claimant to file timely the

physicians' reports is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer is responsible for the reasonable and necessary medical care and treatment causally related to the March 8, 2000 work-related injury, as specifically awarded subject to the provisions of Section 7 of the Act.

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (19989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

Section 14(e) provides that if the employer fails to pay any installment of compensation voluntarily within fourteen (14) days after it becomes due, employer is liable for an additional ten (10) percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the District Director. 33 U.S.C. §914(e). Section 14(b), as amended in 1984, provides that all compensation is "due" on the fourteenth day after the employer has been notified pursuant to Section 12 or the employer has knowledge of the injury. 33 U.S.C. §§912, 914(b) (Supp. IV 1986).

It is well-settled that the Section 14(e) additional assessment is mandatory and may not be waived by Claimant. **Tezeno v. Consolidated Aluminum Corp.**, 13 BRBS 778, 783 (1981); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Harris v. Marine Terminals Corp.**, 8 BRBS 712 (1978); **Nulty v. Halter Marine Fabricators, Inc.**, 1 BRBS 437 (1975). It is also well-settled that compensation becomes due fourteen (14) days after the employer has knowledge of its employee’s injury or death, and not until such time as the claim is filed. **Pilkington v. Sun Shipbuilding & Dry Dock Company**, 9 BRBS 473 (1978). The Employer has consistently treated Claimant’s back problems as non-industrial and took no action until after the informal conference. Thus, Section 14(e) applies herein on those installments due between March 11, 2000 and March 20, 2000.

Employer was directed at the hearing to file with this Court a copy of the LS-207 (TR 25), but no such document was filed herein.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 21, 2000, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer shall pay to Claimant compensation for his temporary total disability, based upon his average weekly wage at the time of the injury, $400.00, as provided by Section 8(a) of the Act, and such benefits shall be paid from March 9, 2000 through March 20, 2000.

2. The Employer shall receive credit for that compensation previously paid to the Claimant as a result of his March 8, 2000 injury, from March 9, 2000 through March 20, 2000, pursuant to Section 3(e) of the Act.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including those medical expenses specifically discussed and awarded herein, **i.e.**, the unpaid medical bills of Dr. Rosenbaum and Dr. Slaughter, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant additional compensation at the rate of ten (10) percent, pursuant to Section 14(e) of the Act, based upon installments due between March 9, 2000 and March 20, 2000.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 21, 2000.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl